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No.

In the Supreme Court of the United States

MATTHEW HENSLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a sentencing judge may, consistent with the Ex Post Facto Clause, employ the version of the U.S. Sentencing Guidelines Manual in effect at the time of sentencing even though it produces a longer sentence calculation than the Guidelines Manual in effect at the time the offense was committed.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Matthew Hensley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 574 F.3d 384. The district court's oral ruling on sentencing (App., *infra*, 15a-30a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 2009. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

U.S. Const. Art. I, § 9 provides in relevant part:

> No Bill of Attainder or ex post facto Law shall be passed.

The U.S. Sentencing Guidelines Manual § 1B1.11 (2008) provides in relevant part:

> (a) The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.
>
> (b)(1) If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the *ex post facto* clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.

STATEMENT

Prior to *United States* v. *Booker*, 543 U.S. 220 (2005), the courts of appeals agreed that the Ex Post Facto Clause barred a court from using the United States Sentencing Guidelines Manual in effect on the date of sentencing, if that Manual called for a harsher sentence than the Manual in effect at the time the defendant committed his offense. *United States* v. *Seacott*, 15 F.3d 1380, 1386 (7th Cir. 1994); *United States* v. *Schnell*, 982 F.2d 216, 218 (7th Cir. 1992) (collecting cases); see also *Miller* v. *Florida*, 482 U.S. 423 (1987) (concerning Florida sentencing guidelines).

In the wake of this Court's holding in *Booker* rendering the Guidelines advisory, the courts of appeals have reached conflicting conclusions about whether the Ex Post Facto Clause is violated by the use of a post-offense version of the Guidelines that calculates a harsher sentence.

The Seventh Circuit has determined that the Guidelines no longer implicate the Ex Post Facto Clause. It held in the present case that the district court properly used the Guidelines Manual in effect at the time of petitioner's sentencing, even though it produced a 43- to 54-month increase in petitioner's recommended Guidelines sentencing range, as compared to the Guidelines Manual in effect at the time petitioner committed his offense. See App. 6a.

The D.C. Circuit has reached the opposite conclusion. It determined in *United States* v. *Turner* that "the existence of discretion does not foreclose an *ex post facto* claim" and held that the Clause continues, post-*Booker*, to bar retroactive application of

harsher Guidelines. 548 F.3d 1094, 1100 (D.C. Cir. 2008).

The other courts of appeals' statements regarding the issue indicate conflicting views regarding this question. And the issue recurs with great frequency: more than 55 cases since *Booker* have raised the question regarding application of the Ex Post Facto Clause presented here. See page 20 & note 8, *infra*.

The lower courts' disagreement—and the resulting disparate treatment of similarly-situated defendants—stems from their conflicting views regarding an important issue of Ex Post Facto Clause jurisprudence: whether the formal status of a legal rule conclusively determines the applicability of the Ex Post Facto Clause, or whether the legal rule's potential and practical effects are relevant to the analysis, as this Court held in *Miller* v. Florida, *supra*.

Those potential and practical effects are dispositive here. This Court has made clear that a judge's use of the Guidelines at sentencing is formally discretionary: one factor among many to be taken into account, and subject to light appellate review. See *Kimbrough* v. *United States*, 128 S. Ct. 558, 564 (2007); *Booker*, 543 U.S. 220. But district courts are still required by law to calculate the Guidelines range as "the starting point and initial benchmark," *Gall* v. *United States*, 128 S. Ct. 586, 596 (2007); a court of appeals may apply a presumption of reasonableness to a within-Guidelines sentence, see *Rita*, 551 U.S. at 347; and in practice, over 80% of all federal sentences, even today, continue to conform with the Guidelines, see pp. 28-32, *infra*. And Congress has charged the U.S. Sentencing Commission by statute with prescribing Guidelines to avoid unwar-

ranted sentencing disparities, see *Rita* v. *United States*, 551 U.S. 338, 347-348 (2007).

This Court should grant review to clarify the particular question regarding the status of the Guidelines under the Ex Post Facto Clause and to reaffirm its prior holdings that a legal rule's formal status is not dispositive in determining the Clause's applicability.

A. Legal Background

1. The Sentencing Reform Act of 1984 ("SRA"), Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 & 28 U.S.C.), established and delegated authority to the U.S. Sentencing Commission to write sentencing guidelines to carry out Congress's basic sentencing objectives of achieving fairness and proportionality, avoiding unwarranted sentencing disparities, and maintaining flexibility for individualized sentences when warranted. The Guidelines establish base offense levels for federal crimes, provide a method for determining a defendant's criminal history, and recommend departures based on the circumstances of the offense and the offender's criminal history. Each year, the Sentencing Commission issues a new Guidelines Manual, which incorporates amendments to the prior version of the Guidelines.

Courts use the Guidelines Manual in the sentencing process to calculate a final offense level, which translates into a recommended sentencing range when cross-referenced with the defendant's history category. Prior to *Booker*, judges were required to sentence defendants according to the Guidelines. Departures from the Guidelines' recom-

mendations were permitted but required justification. 18 U.S.C. § 3553(b)(1) (2003).

In *Booker*, this Court held that the mandatory nature of the Guidelines violated the Sixth Amendment. It struck down the provisions of the SRA that made the Guidelines mandatory and that established standards of review on appeal. *Booker*, 543 U.S. at 245. Thus, following *Booker*, the Guidelines sentence is advisory to the district court, not mandatory. See *Kimbrough*, 128 S. Ct. at 564.

Four Supreme Court decisions following *Booker* further clarified the status of the Guidelines. *Rita*, established that the courts of appeals may apply a presumption of reasonableness to within-Guidelines sentences. *Gall* further clarified that all sentences, "whether inside, just outside, or significantly outside the Guidelines range" are subject to the same abuse-of-discretion standard on appellate review, with no heightened standard for sentences outside of the Guidelines range. 128 S. Ct. at 591. On the same day as its decision in *Gall*, this Court held in *Kimbrough* that "the Guidelines * * * now serve as one factor among several that courts must consider in determining an appropriate sentence," and that although the judge "must include the Guidelines range in the array of factors warranting consideration," the judge can find a policy disagreement with the Guidelines or decide that a Guidelines sentence is "greater than necessary." 128 S. Ct. at 564 (internal quotation marks omitted).

Most recently, *Spears* v. *United States* held that "district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines." 129 S. Ct. 840, 843-844 (2009).

2. Since 1992, the Guidelines have specified that a sentencing court is to use the Guidelines Manual "in effect on the date that the defendant is sentenced," except when such use "would violate the *ex post facto* clause," in which case "the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed." U.S.S.G. § 1B1.11(a), (b)(1) (2008).

Before *Booker*, the lower courts had reached a consensus that use of the Guidelines Manual in effect at the time of sentencing would violate the Ex Post Facto Clause if that Manual provided for a harsher sentence than the Manual in effect at the time of the defendant's offense. See *United States* v. *Seacott*, 15 F.3d 1380, 1386 (7th Cir. 1994); *United States* v. *Schnell*, 982 F.2d 216, 218 (7th Cir. 1992) (collecting cases). Those rulings rested on this Court's holding in *Miller* v. *Florida*, 482 U.S. 423 (1987), that retroactive application of Florida's sentencing guidelines (which resembled the pre-*Booker* federal Sentencing Guidelines) violated the Ex Post Facto Clause.

Even after *Booker*, the government agreed that the advisory nature of the Guidelines did not exempt them from Ex Post Facto analysis. It reasoned that the federal sentencing system still operated sufficiently like the Florida guideline system considered in *Miller* that the Ex Post Facto Clause would apply to federal Guidelines revisions that increased a defendant's Guidelines range. It was only after the Court's decisions in *Gall* and *Kimbrough* that the Solicitor General instructed the government (in August 2008) to abandon its position that the Ex Post Facto Clause bars the use of the Guidelines in effect at the time of sentencing when those Guidelines result in a

higher advisory Guidelines range. See U.S. Br. at 25-28, *United States* v. *Rooks*, No. 08-4725, 2009 WL 872121 (4th Cir. Feb. 2, 2009).

B. Proceedings Below

In 2006, petitioner was charged in a one-count indictment with attempting to solicit a minor over the Internet in violation of 18 U.S.C. § 2422(b). Petitioner was convicted in the Northern District of Indiana, and was originally scheduled to be sentenced on October 31, 2007. See App. 5a-6a. The statutory minimum sentence for petitioner's offense was 120 months. 18 U.S.C. § 2422(b). The 2006 Guidelines Manual, in effect on the originally scheduled sentencing date, recommended a base offense level of 24 and a sentencing range of between 78 and 97 months. App. 6a.

The government requested that petitioner's sentencing hearing be postponed to January 11, 2008, by which time the 2007 Guidelines Manual was in effect. The 2007 Manual included a four-point increase in the base offense level over the level specified in the 2006 Manual—to 28—and calculated a recommended sentencing range of 121 to 151 months. *Ibid.* This range represented a 43- to 54-month increase from the 2006 recommended Guidelines range.

At the 2008 sentencing hearing, petitioner objected to the court's use of the 2007 Guidelines in determining his sentence, arguing that such use would violate the Ex Post Facto Clause.[1] However, the district court stated:

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[1] Petitioner has argued throughout his appeal that he should have been sentenced under the 2006 Guidelines, which were in effect on October 31, 2007 (the date on which petitioner was

> I'm going to apply the [2007] guidelines that are in effect on today's date because that's what the Supreme Court directs me to do. * * * I * * * believe that what the Supreme Court and what the Seventh Circuit has directed more recently is that I am to apply the guidelines that are in effect on the day of the sentencing.

App. 20a-21a. After calculating the recommended Guidelines range, the court concluded, "I do think that a guideline sentence in this case is altogether appropriate. And I have calculated the guidelines to be 121 months to 151 months given the guidelines in effect at sentencing." *Id.* at 24a-25a. The court ultimately sentenced petitioner to 125 months—at the low end of the 2007 Guidelines range, but well above the 2006 Guidelines range.

Petitioner appealed the sentencing decision on Ex Post Facto grounds. The Court of Appeals for the Seventh Circuit affirmed, relying on its prior decision in *United States* v. *Demaree*, 459 F.3d 791 (7th Cir. 2006) (Posner, J.), cert. denied, 551 U.S. 1167 (2007). See App. 12a-14a.

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originally scheduled to be sentenced). At the time of petitioner's offense, the 2005 Guidelines were in effect. However, the 2005 Guidelines recommend the same base offense level and point enhancements as the 2006 Guidelines for petitioner's offense. See U.S. Sentencing Guidelines Manual § 2G1.3 (2006); U.S. Sentencing Guidelines Manual § 2G1.3 (2005). Therefore, had the sentencing taken place on October 31, 2007, use of the 2006 Guidelines would have resulted in the same calculated sentencing range as use of the 2005 Guidelines, and therefore would not have implicated the Ex Post Facto Clause. For this reason, petitioner argued that the court should have used the 2006 Guidelines in calculating his sentence.

The *Demaree* court had concluded that "the ex post facto clause should apply only to laws and regulations that bind rather than advise," and that because the Guidelines are advisory under *Booker*, a district court's reference to the most recent Guidelines Manual does not offend the Ex Post Facto Clause even if that Manual recommends a harsher sentence than the one in effect when the defendant committed the offense. 459 F.3d at 795.

REASONS FOR GRANTING THE PETITION

The clear, acknowledged conflict among the courts of appeals on the question presented is producing, and will continue to produce, disparate outcomes on substantially identical facts. Each year, for each amendment to the Guidelines that upwardly revises the recommended sentence for an offense, defendants who commit offenses prior to a pertinent amendment but are sentenced thereafter will receive differential treatment at sentencing based solely on the circuits in which their convictions arose.

The root of the disagreement among the lower courts lies in their conflicting interpretations of this Court's Ex Post Facto Clause decisions—in particular, whether the Guidelines' formal advisory status is dispositive of the Ex Post Facto inquiry or whether their functional importance also must be considered. As illustrated by the district court's use of the Guidelines below, the Guidelines in practice continue to exert a very significant gravitational force at sentencing.

This Court's post-*Booker* decisions make clear that "a district court should begin all sentencing proceedings by *correctly* calculating the applicable Guidelines range," using the guidelines as the "start-

ing point and initial benchmark" for the sentence, and only then considering other factors. *Gall*, 128 S. Ct. at 596 (emphasis added). Unless the question presented is resolved by this Court, district courts in the Seventh Circuit and perhaps elsewhere will begin the sentencing process by calculating a sentence according to Guidelines that may be substantially different (and more unfavorable) than those in place on the date of the crime for which these defendants are sentenced. Whether such a practice violates the Ex Post Facto Clause–and, more generally, what standards courts should apply in resolving Ex Post Facto Clause claims—are frequently-recurring, important questions in urgent need of resolution by this Court.

A. The Courts Of Appeals Are Divided On The Question Whether Advisory Sentencing Guidelines Implicate The Ex Post Facto Clause.

1. The Seventh And D.C. Circuits Are Clearly Divided On The Question Presented.

The Seventh and D.C. Circuits have reached squarely conflicting conclusions regarding the question whether, after this Court's decisions rendering the Guidelines advisory, a sentencing judge's application of a newer, harsher version of the Guidelines, which was not in effect at the time of the defendant's offense, violates the Ex Post Facto Clause.

a. The Seventh Circuit holds that "the ex post facto clause should apply only to laws and regulations that bind rather than advise" and, therefore, has no applicability to the Guidelines in light of *Booker*. *Demaree*, 459 F.3d at 795.

The 2000 Guidelines in place at the time Demaree committed her offenses called for a sentencing range of 18 to 24 months for a defendant with her criminal history. However, Demaree was sentenced under the 2004 Guidelines effective at the time of her sentencing, which recommended a 27- to 33-month sentence at the same criminal history level. The district judge sentenced Demaree to 30 months but stated that, *if* the 2000 version had been applicable, he would have sentenced her to only 27 months. Demaree appealed, arguing that the judge's application of the 2004 Guidelines violated the Ex Post Facto Clause. See *Demaree*, 459 F.3d at 792-793.

On appeal, the government confessed error, agreeing with Demaree that the district court had improperly used the later, harsher version of the Guidelines in violation of the Ex Post Facto Clause. *Id.* at 793. (At that time, the Solicitor General had not yet instructed the government to abandon its position that the Ex Post Facto Clause bars the use of the Guidelines in effect at the time of sentencing when those Guidelines result in a higher advisory Guideline range. See U.S. Br. at 27, *United States* v. *Rooks*, No. 08-4725, 2009 WL 872121 (4th Cir. Feb. 2, 2009); page 6, *supra*.)

The Seventh Circuit, speaking through Judge Posner, nevertheless affirmed Demaree's sentence, holding that the district court's use of the later, more severe Guidelines did not violate the Ex Post Facto Clause. In reaching its conclusion, the court rejected a "literal[]" "interpret[ation]" of what it described as this Court's "variously stated" formulas for testing whether a measure violates the Ex Post Facto Clause, as established in *Garner* v. *Jones*, 529 U.S. 244, 255-256 (2000), *California Department of Cor-*

rections v. *Morales*, 514 U.S. 499, 506 n.3 (1995), *Weaver* v. *Graham*, 450 U.S. 24, 29 (1981), and *Lindsey* v. *Washington*, 301 U.S. 397, 401-02 (1937) (per curiam). *Demaree*, 459 F.3d at 794.

The Seventh Circuit acknowledged that this Court's test is whether a measure "places the defendant at a disadvantage * * * compared to the law as it stood when he committed the crime," or "imposed a significant risk of enhanced punishment." *Ibid.* The court of appeals also said that, "interpreted literally," this test leads to the conclusion that the advisory Guidelines still implicate the Ex Post Facto Clause. *Ibid.*

The Seventh Circuit nonetheless held that "the ex post facto clause *should* apply only to laws and regulations that bind rather than advise." *Id.* at 795 (emphasis added). In arguing that the post-*Booker* Guidelines fall in the "laws * * * that advise" category, the court of appeals relied heavily on its understanding that a judge's selection of sentence "is discretionary and subject therefore to only light appellate review." *Ibid.* The court also stated that any other holding would be an exercise in "futility," because "whenever a law or regulation is advisory, the judge can always say not that he based his sentence on it but that he took the advice implicit in it." *Ibid.*

The Seventh Circuit has subsequently adhered to its holding in *Demaree*, including in the instant case. See App. 13a-14a.

b. The D.C. Circuit in *Turner* expressly rejected *Demaree*'s holding. Because the Guidelines still serve as an anchor and starting point for calculating sentences, the D.C. Circuit concluded that a court's decision about which version of the Guidelines to use

when sentencing a defendant significantly affects the severity of the resulting sentence. See *Turner*, 548 F.3d at 1099-1100. Thus, the D.C. Circuit held, the Guidelines still implicate the Ex Post Facto Clause. *Turner*, 548 F.3d at 1099-1100.

Turner, relying on this Court's decision in *Garner*, determined that "'[t]he controlling inquiry * * *' is how the [relevant] authority 'exercises discretion in practice' and whether 'exercise[s] of discretion . . . actually create[] a significant risk of prolonging [an inmate's] incarceration.'" *Ibid.* (quoting *Fletcher* v. *Reilly*, 433 F.3d 867, 876 (D.C. Cir. 2006) and *Garner*, 529 U.S. at 251). The D.C. Circuit applied the *Garner* test to the facts of *Turner*: When Turner committed his offense in 2001, the applicable Guidelines base offense level was 10 and his Guidelines sentencing range was 21 to 27 months; by 2006, the former was 14 and the latter 33 to 41 months. *Id.* at 1096. Applying the 2006 Guidelines, the district court sentenced Turner to 33 months. *Ibid.* The D.C. Circuit found that "using the 2006 Guidelines created a substantial risk that Turner's sentence was more severe, thus resulting in a violation of the Ex Post Facto Clause." *Id.* at 1100.

In concluding that retroactive application of a harsher version of the Guidelines continues to implicate the Ex Post Facto Clause, the court referenced this Court's decision in *Rita* that "appellate courts may apply a presumption of reasonableness to a district court sentence calculated in conformity with the Guidelines," and that therefore, "judges are more likely to sentence within the Guidelines." *Id.* at 1099. The *Turner* court also noted that, in fact, "most federal sentences fall within Guidelines ranges even after *Booker*" and that the "impact of *Booker*" on

judges' deviation from the Guidelines has been "minor." *Ibid.* (citing U.S. Sentencing Commission, *Final Report on the Impact of* United States v. Booker *on Federal Sentencing* 57 (2006); U.S. Sentencing Commission, *Final Quarterly Data Report: Fiscal Year 2007*, at 1 (2007)).

The D.C. Circuit understood that the deference permissibly accorded to within-Guidelines sentences under *Rita* provides an incentive to district court judges to issue within-Guidelines sentences. And it recognized that, empirically, most sentences remain in conformance with the Guidelines. Therefore, it concluded, a judge's decision about which version of the Guidelines to use significantly influences the "risk of increasing the measure of punishment attached to the [defendant's] crimes." *Garner*, 529 U.S. at 250 (internal citations and quotation marks omitted).

2. Several Circuits Have Indicated Agreement With Either The Seventh Circuit's Holding In Demaree *Or The D.C. Circuit's Holding In* Turner.

No other court of appeals has squarely decided whether the Ex Post Facto Clause applies to retroactive application of the now-advisory Guidelines. The First, Sixth, Eighth, and Ninth Circuits, however, have indicated agreement with the D.C. Circuit that retroactive application of a harsher version of the Guidelines still violates the Ex Post Facto Clause. By contrast, the Fifth Circuit has suggested—in seeming agreement with the Seventh Circuit—that the Guidelines no longer implicate the Ex Post Facto Clause because of their advisory nature, and that a court need never apply the Manual in effect at the

time of the defendant's offense, even if a newer, harsher version is in effect at the time of sentencing.

a. *First Circuit.* Through several cases—from one decided immediately following *Booker* to a 2008 ruling—the First Circuit has reiterated, "[w]e expect that the Ex Post Facto Clause [still] requires application of the older Guidelines if those would be more lenient." *United States* v. *Jaca-Nazario*, 521 F.3d 50, 56 (1st Cir. 2008).

The clearest indication of the First Circuit's agreement with *Turner* is the decision *United States* v. *Gilman*, 478 F.3d 440 (1st Cir. 2007).[2] In *Gilman*, the First Circuit acknowledged *Demaree*'s holding but stated in dicta that such a position was "doubtful in this circuit," and cited an early post-*Booker* case—*United States* v. *Cruzado-Laureano*, 404 F.3d 470 (1st Cir. 2005), cert. denied, 546 U.S. 1009—in support. *Gilman*, 478 F.3d at 449. In *Cruzado-Laureano*, the First Circuit had implied that, post-*Booker*, it continued to believe that the Guidelines implicate the Ex Post Facto clause, and that district courts must apply an earlier version of the Guidelines if application of a later version would result in a higher Guidelines range.[3]

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[2] The Sixth Circuit has understood *Gilman* to indicate the First Circuit's rejection of *Demaree*. See *United States* v. *Duane*, 533 F.3d 441, 447 n.1 (6th Cir. 2008).

[3] In *Cruzado-Laureano*, the district court, to avoid violating the Ex Post Facto Clause, sentenced the defendant under the 2000 version of the Guidelines rather than the 2002 version in effect at sentencing. The First Circuit found that the district court had erred in doing so, because the version of the Guidelines in effect at the time of the defendant's offense was the *2001*—not the 2000—version, and the relevant Guidelines provisions had not changed between 2001 and 2002. Rather than analyze

b. *Sixth Circuit.* The Sixth Circuit has also suggested that *Booker* and its progeny do not disturb settled circuit law that retroactive application of a harsher Guidelines Manual violates the Ex Post Facto Clause. In *United States* v. *Duane*, the Sixth Circuit rejected the Seventh Circuit's "conclu[sion] that 'the ex post facto clause should apply only to laws and regulations that bind rather than advise,'" 533 F.3d 441, 447 n.1 (6th Cir. 2008) (quoting *Demaree*, 459 F.3d at 795), and instead "assume[d] *arguendo* that a retroactive change to the Guidelines could implicate the *Ex Post Facto* Clause." *Id.* at 447.

In deciding to make this assumption, rather than embrace the Seventh Circuit's position, *Duane* "decline[d] to read" an earlier Sixth Circuit case, *United States* v. *Barton*, 455 F.3d 649 (6th Cir. 2006), cert. denied, 549 U.S. 1087, "to suggest that a change to the Guidelines does not raise an *ex post facto* concern," because (i) *Barton* "was concerned with retroactively applying *Booker*—a judicial decision—rather than a new version of the Guidelines," (ii) "following *Barton*[,] this court has continued to examine the *ex post facto* implications of applying a revised version of the Guidelines retroactively," and (iii) "a number of other circuits have continued, post-*Booker*, to analyze whether applying revised Guidelines retroactively violates the *Ex Post Facto* Clause." *Id.* at 446-447 & 447 n.1.

The Sixth Circuit further observed that the Seventh Circuit's approach "is somewhat inconsistent with our recognition—in the context of parole guide-

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whether the district court's erroneous application of the 2000 version prejudiced the defendant, the First Circuit reversed and remanded for resentencing under the 2002 Guidelines. 404 F.3d at 488-489.

lines—that 'the [Supreme Court has] made clear that guidelines that affect discretion, rather than mandate outcomes, are nevertheless subject to ex post facto scrutiny * * * .'" *Id.* at 447 (quoting *Michael* v. *Ghee*, 498 F.3d 372, 382 (6th Cir. 2007) (citing *Garner*, 529 U.S. at 253), cert. denied, 128 S. Ct. 2067 (2008)) (alteration in original).

c. *Eighth Circuit.* The Eighth Circuit has also suggested since *Booker* that "retrospective application of the [advisory] Guidelines implicates the *ex post facto* clause." *United States* v. *Carter*, 490 F.3d 641, 643 (8th Cir. 2007) (quoting *United States* v. *Larrabee*, 436 F.3d 890, 894 (8th Cir. 2006)[4]). In *Carter*, the Eighth Circuit acknowledged but declined to embrace the Seventh Circuit's holding in *Demaree* "that the *ex post facto* clause does not apply to the now-advisory guidelines," and instead decided to "proceed to address Mr. Carter's *ex post facto* claim." *Ibid.*[5] See also *United States* v. *Anderson*, 570 F.3d 1025, 1034 n.7 (8th Cir. 2009) ("[W]e assume that the Ex Post Facto Clause applies to a district court's application of the sentencing guidelines even after * * * *Booker* * * * .") (citing *Carter*, 490 F.3d at 643).

d. *Ninth Circuit.* The Ninth Circuit has also suggested that *Booker* and its progeny do not disturb the

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[4] *Larrabee* concerned appellate review of the reasonableness of a district court's non-Guidelines sentence with reference to a version of the Guidelines that was not in effect at the time of the offense of conviction, not the use of later Guidelines in the initial Guidelines calculation. 436 F.3d at 893-894.

[5] The *Carter* court ultimately decided that the defendant had forfeited his Ex Post Facto challenge. *Carter*, 490 F.3d at 645-646.

pre-*Booker* consensus that the Guidelines (although now advisory) implicate the Ex Post Facto Clause. For example, in *United States* v. *Stevens*, the Ninth Circuit vacated and remanded on Ex Post Facto grounds a sentence originally calculated post-*Booker* by reference to a substantive amendment to the Guidelines that had not been in effect when the crime was committed, because "we cannot say on this record that the court would have imposed the same 360-month sentence had it not erred in its base offense level calculation." 462 F.3d 1169, 1172 (9th Cir. 2006). See also *United States* v. *Rising Sun*, 522 F.3d 989, 993 n.1 (9th Cir. 2008) (stating in dicta that the district court was "correct" when it "determined that the Ex Post Facto Clause [would be] implicated" by using the version of the Guidelines in effect on the day of sentencing because it called for a higher base offense level than the Guidelines in effect at the time of the offense of conviction).[6]

e. *Fifth Circuit.* In *United States* v. *Rodarte-Vasquez*, the Fifth Circuit concluded that the district court's retroactive application of a harsher version of the Guidelines at a pre-*Booker* sentencing "constituted an *ex post facto* violation." 488 F.3d 316, 324 (5th Cir. 2007). However, in her concurring opinion, Chief Judge Jones clarified that the court had not

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[6] See also *United States* v. *Andres*, 178 Fed. Appx. 736, 741 (9th Cir. 2006) (unpublished opinion) ("reject[ing] [the] argument that *Booker* rendered discretionary the particular Guidelines Manual to be utilized" and noting that "[b]ecause the district court determined that use of the Guidelines in effect at the time of [the post-*Booker*] sentencing might implicate the ex post facto clause, it *properly* * * * applied the version in effect on the last day of the offense of conviction" as opposed to the date of sentencing) (internal quotation marks omitted) (emphasis added).

"reach[ed] the issue whether the *ex post facto* clause can apply to a post-*Booker* sentence" because the case "ar[o]se[] from a pre-*Booker* sentencing":

> Post-*Booker*, the guidelines are informative, not mandatory. A purely advisory regulation does not present an *ex post facto* problem solely because it is traceable to Congress and will possibly disadvantage a defendant. This principle has been recognized by the Supreme Court with respect to the parole guidelines, see, *e.g.*, *Garner*, * * * and I see no reason not to extend it to the present context. Judge Posner persuasively adopted this view in * * * *Demaree*[.]

Id. at 325 (Jones, J., concurring).[7]

The Fifth Circuit has continued to cite Judge Jones's concurring opinion in *Rodarte-Vasquez* as evidence for the Fifth Circuit's potential agreement with *Demaree*. See *United States* v. *Sanchez*, 527 F.3d 463, 466 (5th Cir. 2008) (discussing how this opinion "suggest[s] that, post-*Booker*, the sentencing guidelines cannot present an ex post facto problem because they are purely advisory"). See also *United States* v. *Boyd*, 317 Fed. Appx. 415, 417 (5th Cir. 2009) (unpublished opinion) (reviewing for plain error the district court's decision to sentence Boyd "under the incorrect version of the now-advisory guidelines," deciding not to reverse because the "error [was] not obvious," and citing Chief Judge Jones's concurring opinion in *Rodarte-Vasquez* for the proposition that "[a]fter *Booker*, it is not clear that an ex

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[7] Thus, the Sixth Circuit was incorrect when, in *Duane*, 533 F.3d at 447 n.1, it interpreted *Rodarte-Vasquez* as indicating the Fifth Circuit's disagreement with *Demaree*.

post facto violation occurs when a district court sentences a defendant under the incorrect version of the now-advisory guidelines"), cert. denied, 2009 WL 1808271 (2009); *United States* v. *McBirney*, 261 Fed. Appx. 741, 747 n.11 (5th Cir. 2008) (unpublished opinion) (citing Chief Judge Jones's concurring opinion in *Rodarte-Vasquez* for support for its characterization of the proposition that the Guidelines still implicate the Ex Post Facto Clause as "dubious * * * now that the guidelines are advisory, not mandatory"), cert. denied, 129 S. Ct. 43.

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The Seventh Circuit and the D.C. Circuit have reached holdings fundamentally at odds with each other on the question of whether the now-advisory Guidelines continue to implicate the Ex Post Facto Clause. Several of the other courts of appealshave suggested agreement with either *Demaree* or *Turner*. In light of the clear, acknowledged conflict, and the disagreeing views expressed by other courts of appeals, certiorari is warranted now to resolve the conflicting views regarding the question presented.

B. The Question Presented Recurs Frequently And Requires Resolution.

The question of which Guidelines Manual a sentencing judge should apply—the Manual in effect at sentencing, which results in a longer calculated sentence, or the Manual in effect at the time of the defendant's offense—recurs with great frequency. We have identified more than 55 cases in which the issue has arisen since *Booker*.[8] Of course, this represents

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[8] See the cases discussed in Part A, *supra*, as well as *United States* v. *McGowan*, 315 Fed. Appx. 338 (2nd Cir. 2009); *United*

States v. *Boyle*, 283 Fed. Appx. 825 (2d Cir. 2007), aff'd, 129 S. Ct. 2237 (2009); *United States* v. *Kilkenny*, 493 F.3d 122 (2d Cir. 2007); *United States* v. *Ausburn*, 502 F.3d 313 (3d Cir. 2007), cert. denied, 129 S. Ct. 32 (2008); *United States* v. *Wood*, 486 F.3d 781 (3d Cir. 2007), cert. denied, 128 S. Ct. 130; *United States* v. *Share*, 223 Fed. Appx. 103 (3rd Cir. 2007); Reply Brief of Appellant, *United States* v. *Knight*, No. 09-4282, 2009 WL 2627151 (4th Cir. Aug. 27, 2009); Opening Brief for Appellant Newmark, *United States* v. *Newmark*, No. 08-3356, 2009 WL 2816993 (4th Cir. July 27, 2009); *United States* v. *Sinclair*, 293 Fed. Appx. 235 (4th Cir. 2008); *United States* v. *Iskander*, 407 F.3d 232 (4th Cir. 2005); *United States* v. *Austin*, 479 F.3d 363 (5th Cir. 2007); *United States* v. *Kilgarlin*, 157 Fed. Appx. 716 (5th Cir. 2005); *United States* v. *Reasor*, 418 F.3d 466 (5th Cir. 2005); Brief of Defendant-Appellant, *United States* v. *Jones*, No. 08-2175, 2009 WL 982859 (6th Cir. Apr. 1, 2009); *United States* v. *Jeross*, 521 F.3d 562 (6th Cir. 2008), cert. denied, 129 S. Ct. 1311 (2009); *United States* v. *Burke*, 252 Fed. Appx. 49 (6th Cir. 2007); *United States* v. *Davis*, 397 F.3d 340 (6th Cir. 2005); *United States* v. *Harmon*, 409 F.3d 701 (6th Cir. 2005); *United States* v. *Lacefield*, 146 Fed. Appx. 15 (6th Cir. 2005); *United States* v. *Braggs*, 196 Fed. Appx. 442 (8th Cir. 2006); Appellant's Opening Brief, *United States* v. *Forrester*, No. 09-50029, 2009 WL 3044538 (9th Cir. Apr. 17, 2009); Defendant-Appellant's Opening Brief, *United States* v. *Breton-Rodriguez*, Nos. 08-10266, 08-10400, 2009 WL 2955489 (9th Cir. Feb. 2, 2009); Appellant's Opening Brief, *United States* v. *Riley*, No. 08-50009, 2008 WL 4659676 (9th Cir. Sep. 9, 2008); *United States* v. *Mix*, 457 F.3d 906 (9th Cir. 2006); *United States* v. *Scott*, 529 F.3d 1290 (10th Cir. 2008); *United States* v. *Zirger*, 257 Fed. Appx. 59 (10th Cir. 2007); *United States* v. *Jones*, 254 Fed. Appx. 711 (10th Cir. 2007), cert. denied, 2009 WL 1574243 (2009); *United States* v. *Hoff*, 215 Fed. Appx. 720 (10th Cir. 2007); *United States* v. *Fowler*, No. 08-16413, 2009 WL 2515735 (11th Cir. Aug. 19, 2009); *United States* v. *Shira*, 286 Fed. Appx. 650 (11th Cir. 2008); *United States* v. *Mathis*, 239 Fed. Appx. 513 (11th Cir. 2007), cert. denied, 128 S. Ct. 1687 (2008); *United States* v. *Kladek*, No. 08CR0290(PJS/AJB), 2009 WL 2835158 (D. Minn. Aug. 31, 2009); *Nash* v. *United States*, Nos. 1:07-cr-00002, 1:08-cv-00620, 2009 WL 262217 (S.D. Ohio Feb. 4, 2009); *United States* v. *Doyle*, 621 F. Supp. 2d 345 (W.D. Va.

only a fraction of the actual number of cases in which courts have had to address this question post-*Booker*, because only a fraction of all sentencing decisions are reported in judicial opinions and not all sentencing decisions are appealed.

The question whether the Guidelines still implicate the Ex Post Facto Clause will continue to arise as the Sentencing Commission continues to amend the Guidelines. Each year, the Federal Sentencing Commission revises the Guidelines, including modifying sentences for preexisting crimes. A significant number of these amendments represent upward revisions to recommended sentences. For example, at least *one-third* of the Guidelines amendments (21 of 63) made since *Booker* upwardly revised a base offense level, created a new upward enhancement, or otherwise increased the penalty for a preexisting offense. See U.S. Sentencing Commission Guidelines Manual app. C. supp. (2008).

Amendment 723, effective November 1, 2008, for example, added an offense characteristic that provides a four-level enhancement for violations of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 *et seq.* ("FDCA"). The Sentencing Commission rationalized this enhancement by explaining that it was based on "public comment and testimony that an enhancement is appropriate to account for * * * second or subsequent FDCA violations." U.S. Sentencing Commission Guidelines Manual app. C. supp. 297 (2008). Another amendment, number 691, addresses a number of issues relevant to the primary

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2009); *United States* v. *Lewis*, 603 F. Supp. 2d 874 (E.D. Va. 2009); *United States* v. *Restrepo-Suares*, 516 F. Supp. 2d 112 (D.D.C. 2007); *United States* v. *Kandirakis*, 441 F. Supp. 2d 282 (D. Mass. 2006).

firearms guideline, § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). The Amendment, *inter alia*, provides a four-level enhancement at § 2K2.1(b)(5) if the defendant engaged in the trafficking of firearms, and modifies § 2K2.1(b)(4) to increase penalties for offenses involving altered or obliterated serial numbers. See *id.* at 166-173. The other amendments cover a similarly diverse set of issues.

The Sentencing Commission's consistent pattern of upward revisions to the Guidelines means that courts will continue to be confronted with the question of whether to apply newer, more severe versions of the Guidelines over the versions in effect at the time of defendants' offenses. Until this Court resolves the question, courts will continue to answer this question in different ways, affecting a substantial number of defendants' sentences across the country.

Indeed, statements by judges, scholars, and commentators confirm the importance of the question presented. See C. Clayman & H. Protass, *The Ex Post Facto Clause in the Post*-Booker *World*, New York Law Journal, July 1, 2009, at 4 (quoting U.S. District Judge Lewis A. Kaplan as describing the question of whether the Ex Post Facto Clause continues to apply to the Guidelines in the wake of *Booker* as "fascinating" and "intriguing"); Douglas Berman's Sentencing Law and Policy Blog, at http://sentencing.typepad.com (Dec. 5, 2008 and April 17, 2009); J. Dillon, *Doubting* Demaree, 110 W. Va. L. Rev. 1033 (2008); D. Levy, *Defending* Demaree*: The Ex Post Facto Clause's Lack of Control Over*

the Federal Sentencing Guidelines After Booker, 77 Fordham L. Rev. 2623 (2009).

C. The Ex Post Facto Clause Prohibits The Retroactive Use By A District Court Of A Version Of The Guidelines That Calculates A Harsher Sentence.

This Court's Ex Post Facto jurisprudence has consistently emphasized the functional effect of retroactive modifications to the law over purely formal considerations. The retroactive application of measures that create a "sufficient" or "significant risk" of increasing a defendant's punishment triggers the Ex Post Facto Clause. *Garner*, 529 U.S. at 250-251 (quoting *Morales*, 514 U.S. at 509). Retroactively applying the harsher 2007 Guidelines to petitioner substantially risked prolonging his punishment and therefore violated the Ex Post Facto Clause.

1. *Measures That Sufficiently Risk Prolonging The Period Of Punishment Violate The Ex Post Facto Clause.*

The Ex Post Facto Clause bars the retroactive application of measures that pose a "sufficient" or "significant risk of prolonging" a defendant's punishment. *Id.* at 251 (quoting *Morales*, 514 U.S. 509). A two-pronged inquiry is used to assess the existence of such a risk. *Id.* at 251, 255. A court must first examine a measure's effect *formally*, by considering its substance and the "framework" in which it operates, including the degree of discretion allowed in its implementation. See *id.* at 251.

If the formal analysis fails to reveal a significant risk, a second, practical inquiry applies: A challenger must "demonstrate, by evidence drawn from the rule's *practical implementation* by the agency

charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule." *Id.* at 255 (emphasis added).[9]

Garner applied both prongs of the analysis to a state administrative rule that increased the interval between parole reconsideration hearings, for prisoners serving life sentences, from three to eight years. *Id.* at 247. The rule allowed authorities "broad discretion" to hold more frequent hearings if warranted to determine early release. *Id.* at 253. A formal evaluation of the rule did not reveal a sufficient risk of prolonged punishment. *Id.* at 254. But applying the empirical analysis led this Court to reverse and remand because the courts below failed to consider whether the measure "*in its operation*" significantly risked increasing Garner's punishment. *Id.* at 257 (emphasis added).

That the measure at issue in *Garner* allowed for discretion in its implementation did not exempt it from Ex Post Facto scrutiny. "The presence of discre-

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[9] *Garner* is the governing and most recent articulation of this Court's general Ex Post Facto analysis. However, the retroactive application of the Guidelines would also violate the Clause under the analysis applied in *Miller* v. *Florida*, 482 U.S. 423 (1987), which prohibits the retroactive application of measures that "substantially disadvantage" defendants. *Id.* at 432. Here, for example, petitioner was substantially disadvantaged, in the sense defined by *Miller*, by the district court's erroneous determination of a Guidelines range above, rather than substantially below, the statutory minimum for the offense of conviction. See App. 6a. As described in the text, district courts' general adherence to the Guidelines range in the overwhelming majority of cases means that, *Booker* notwithstanding, an erroneous calculation will generally lead to a different sentence. See *Gall*, 128 S. Ct. at 596.

tion does *not* displace the protections of the *Ex Post Facto* Clause * * * ." *Id.* at 253 (emphasis added). *Garner* held that any measure—whether binding or advisory in nature—that poses more than a "speculative" risk of increasing the length of incarceration violates the Ex Post Facto Clause. *Id.* at 251 (quoting *Morales*, 514 U.S. at 509). "[I]t is the *effect*, not the form, of the law that determines whether it is *ex post facto*." *Weaver* v. *Graham*, 450 U.S. 24, 31 (1981) (emphasis added); see *Cummings* v. *Missouri*, 71 U.S. 277, 325 (1866); *Fletcher* v. *Peck*, 10 U.S. 87, 138-139 (1810) (Marshall, C.J.) (invalidating a measure that had the "effect" of an ex post facto law).

2. Retroactively Applying The 2007 Guidelines To Petitioner Violated The Ex Post Facto Clause.

Here, applying a harsher version of the Guidelines at sentencing than the one in effect at the time of petitioner's offense violated the Ex Post Facto Clause under both of the standards adopted by this Court. In declaring that the Ex Post Facto Clause applies solely to "laws and regulations that bind rather than advise," *Demaree*, 495 F.3d at 795, the Seventh Circuit ignored this Court's precedents squarely rejecting that approach. Applying the standard set forth by this Court reveals the extent of the Seventh Circuit's error.

a. Under this Court's "formal" analysis, the Guidelines create a significant risk of prolonged punishment when applied retroactively. Following *Booker* this Court has made clear that the Guidelines must serve as "the starting point and the initial benchmark" in the sentencing process. *Gall*, 128 S. Ct. at 596. District judges must calculate the Guidelines' prescribed sentencing range and consider any

relevant policy statements produced by the Sentencing Commission. See 18 U.S.C. § 3553(a)(4)-(5). "[F]ailing to calculate (or improperly calculating) the Guidelines range," in fact, constitutes a "significant procedural error." *Gall*, 128 S. Ct. at 597.

The particular version of the Guidelines that a judge uses, therefore, forms the axis around which the sentencing calculus revolves. Starting the process by considering newer Guidelines that call for harsher punishments inevitably pulls the determination toward a stiffer sentence.

Moreover, the presumption of reasonableness attached to within-Guidelines sentences on appellate review provides that within-Guidelines sentences remain the default outcome. See *Rita*, 551 U.S. 338. Seven circuits employ the presumption of reasonableness.[10] *Rita* acknowledged that the "presumption [might] encourage sentencing judges to impose Guidelines sentences," even though district judges cannot apply the presumption themselves. *Id.* at 354. And as former Judge McConnell noted, "the rebuttability of the presumption is more theoretical than real." *United States* v. *Pruitt*, 502 F.3d 1154, 1166 (10th Cir. 2007) (concurring opinion), judgment vacated, 128 S. Ct. 1869 (2008). *Rita* thus incentivizes judges to render within-Guidelines sentences.

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[10] See *United States* v. *Wilms*, 495 F.3d 277 (6th Cir. 2007); *United States* v. *Dorcely*, 454 F.3d 366 (D.C. Cir. 2006); *United States* v. *Kristl*, 437 F.3d 1050 (10th Cir. 2006); *United States* v. *Green*, 436 F.3d 449 (4th Cir. 2006); *United States* v. *Alonzo*, 435 F.3d 551 (5th Cir. 2006); *United States* v. *Mykytiuk*, 415 F.3d 606 (7th Cir. 2005); *United States* v. *Lincoln*, 413 F.3d 716 (8th Cir. 2005).

The continuing magnetism of the Guidelines in the sentencing process is not surprising. *Booker* itself confirmed that the Sentencing Commission would continue "writing Guidelines" so as to "promote uniformity in the sentencing process." 543 U.S. at 263-264. But of course only Guidelines that truly "guide" sentencing decisions can promote uniformity.

The present case exemplifies the continued very significant impact of the Guidelines. The sentencing judge "did not pull the [sentence of 125 months] out of thin air." *Turner*, 548 F.3d at 1100. The 2007 Guidelines prescribed a range between 121 and 151 months, and he selected a sentence on the low end. App. 6a. Had the judge relied on the prior Guidelines, which called for a lower sentence by 43 to 54 months, petitioner may well have received a sentence closer to the mandatory minimum. See App. 6a. And, under *Garner*, petitioner need only show that application of the 2007 Guidelines sufficiently *risked* increasing his sentence, 529 U.S. at 251, not that it definitively did so, *Miller*, 482 U.S. at 432. In sum, the Guidelines' continuing—and strong—gravitational force ensures that applying the upwardly revised Guidelines to petitioner created a serious risk of enhancing his punishment.

b. The empirical examination prescribed by the second prong of this Court's decision in *Garner* leads to the same conclusion as the formal analysis.

To begin with, the Sentencing Commission's statistics indicate that the post-*Booker*, -*Kimbrough*, and -*Gall* Guidelines possess a magnetic pull closely equivalent to the pre-*Booker* Guidelines. The Sentencing Commission defines the Guidelines "conformance rate" as the combined rate of within-Guidelines and government-sponsored below-

Guidelines sentences. U.S. Sentencing Commission, *Final Report on the Impact of* United States v. Booker *on Federal Sentencing*, at vi (2006).

In the 13-month period from mid-2003 through mid-2004, the Guidelines conformance rate stood at 93.7%. *Id.* at 45-46. In the year following *Booker*, the conformance rate remained strikingly high, at 85.9%. *Id.* at 57.

The conformance rate has remained in the mid- to low-80% range since then: It was 86.3% in fiscal year 2006, 86.4% in fiscal year 2007, 85.0% in fiscal year 2008, and 82.4% in the first three quarters of fiscal year 2009. See U.S. Sentencing Commission, *Preliminary Quarterly Data Report* 1 (2009); U.S. Sentencing Commission, *Final Quarterly Data Report: Fiscal Year 2008*, at 1 (2008); U.S. Sentencing Commission, *Final Quarterly Data Report: Fiscal Year 2007*, at 1 (2007); U.S. Sentencing Commission, *Final Quarterly Data Report: Fiscal Year 2006*, at 1 (2006). Figures 1 and 2 depict these statistics graphically. The top line in Figure 1 displays the Guidelines conformance rate for fiscal year 2001 through the immediate post-*Booker* period. The top line in Figure 2 displays the Guidelines conformance rate for fiscal year 2004 through the first three quarters of fiscal year 2009.

Figure 1: Quarterly Sentencing Data
FY2001 – Post-*Booker*[11]

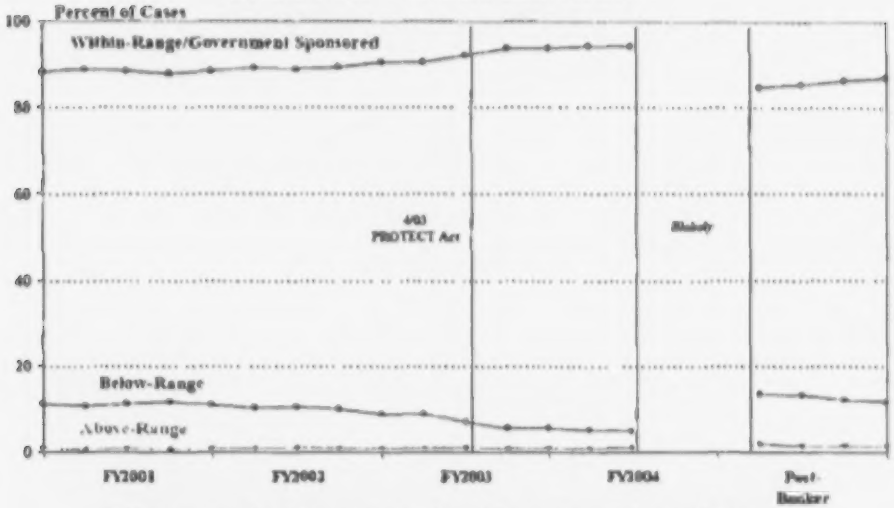
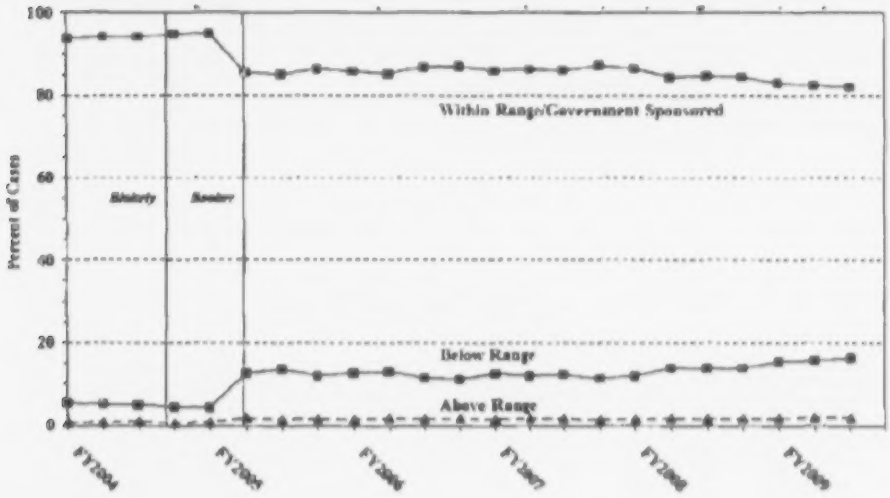


Figure 2: Quarterly Sentencing Data
FY2004 – First Three Quarters of FY2009[12]



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[11] Reprinted from U.S. Sentencing Commission, *Final Report on the Impact of* United States v. Booker *on Federal Sentencing* 56 (2006).

[12] Reprinted from U.S. Sentencing Commission, *Preliminary Quarterly Data Report* 11 (2009).

Statistics also confirm the hypothesis articulated by this Court in *Rita*—that the presumption of reasonableness for within-Guidelines sentences on appellate review might "encourage sentencing judges to impose Guidelines sentences." *Rita*, 551 U.S. at 354. An extensive, multivariate study released in 2007 found that "a circuit's adoption of a presumption of reasonableness decreases the frequency of below-Guidelines" sentencing decisions issued by district judges. A. Robbins & L. Lao, The Effect of Presumptions: An Empirical Examination of Inter-Circuit Sentencing Disparities after *United States v. Booker* 25 (Nov. 4, 2007) (unpublished manuscript), *available at* http://tinyurl.com/EffectofPresumptions. Although the decrease was less than one percent, it was statistically significant, demonstrating the clear pull of the presumption. *Ibid.* The study drew upon a reservoir of "145,047 individual-level observations recorded by the United States Sentencing Commission (comprising all recorded federal sentences in all twelve circuits for a one-year period beginning in November 2004 and ending in October 2006)." *Id.* at 1.

Similarly, a study by the New York Council of Defense Lawyers analyzing 1,515 circuit cases decided between January 1, 2006 and November 16, 2006 revealed that circuits adopting the presumption of reasonableness reverse below-Guidelines sentences at a far greater rate than circuits not employing the presumption. See Brief for New York Council of Defense Lawyers as Amicus Curiae Supporting Petitioner App. at 1a-3a, *Rita*, 551 U.S. 338 (No. 06-5754), *available at* http://tinyurl.com/NYCDLAmicus. Circuits adopting the presumption vacated below-Guidelines sentences in 47 out of 51 cases, a rate of 92%. *Id.* at 3a. Circuits not adopting the presump-

tion, in contrast, vacated below-Guidelines sentences in thirteen of twenty cases, a rate of only 65%. *Ibid.*

These statistics confirm the Guidelines' continuing guiding force, even following *Booker* and its progeny. Operating within a formalized framework that requires sentencing judges to consult them and incentivizes judges to hew closely to them, the Guidelines continue to unify sentencing decisionmaking. Even now, almost five years after *Booker*, more than 80% of sentences conform to the Guidelines.

The Guidelines, therefore, are not purely hortatory devices that fail to exert sway over the sentencing process. Instead, the Guidelines remain the critical component of sentencing decisions, drawing district courts and circuits—particularly those recognizing the presumption of reasonableness—to issue within-Guidelines sentences.

In an environment in which courts ordinarily apply the governing Guidelines, the question of *which* Guidelines a court applies matters immensely. Retroactively applying harsher Guidelines naturally creates a substantial risk of increasing a defendant's punishment. In this case, applying the newer and harsher 2007 Guidelines to petitioner violated the Ex Post Facto Clause.

Only review by this Court can resolve the conflict below and restore the protections secured by the Ex Post Facto Clause to the sentencing process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2009

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 08-1204

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MATTHEW HENSLEY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division. No. 2:06 CR 168 – **Philip P. Simon**, *Judge.*

ARGUED APRIL 9, 2009 – DECIDED JULY 23, 2009

Before MANION, ROVNER, and WOOD, *Circuit Judges.*

MANION, Circuit Judge. Government agents created a fictitious online personality named "Jennifer Sanchez," who represented herself as a 13-year-old girl. Matthew Hensley, using multiple online personas, attempted to cajole Jennifer into having sex with him. A meeting place was arranged. However, while en route, Hensley noticed law enforcement near the meeting place and left the scene. Officers arrested Hensley the next day. A jury convicted him of attempting to solicit a minor for sex in violation of

18 U.S.C. § 2422(b). The district court sentenced him to 125 months' imprisonment. Hensley appeals both his conviction and sentence. We affirm.

I.

The sting that caught Matthew Hensley was part of a wider law-enforcement effort targeting Internet sexual predators. The operation used personnel from several state and federal agencies, including the Immigration and Customs Enforcement ("ICE") and the Secret Service. The plan was to first entice sexual predators over the Internet using agents passing themselves off as minors, and then to nab them when they arrived at Will Park in Valparaiso, the spot where the fictitious minors would tell the perpetrators to meet them for the trysts. The takedowns—approximately ten to twelve of them—were all scheduled to occur on the same day, August 18, 2006, and involved well over 100 law enforcement officers.

ICE agents Demetrius Flowers and Melissa Chan participated in the operation. They posed as a thirteen-year-old girl named "Jennifer Sanchez" and created an online Yahoo profile for her with the screen name jen_indy_13 (hereinafter "Jen"). Beginning August 7, 2006, Agent Flowers, under the guise of that screen name, visited the Indiana section of several Yahoo chat rooms.

That same day, Hensley, using the screen name MattyMac99, struck up a one-on-one conversation with Jen in one of the chat rooms. Both parties revealed their age, sex, and location. Upon discovering that Jen was thirteen years old, Hensley responded, "oh what the hell i'd still fuck you." Later, Hensley, informing Jen that he had sex on his mind, attempted to find out where she lived and what hours

her mom worked. He also asked her what was the most she had ever done with a guy before, when she might want to have sex, if she would let him kiss her, what her number was, and when they could meet.

While Hensley was talking to Jen as MattyMac99, he also was conducting two other one-on-one conversations with her using the screen names MaverickMatt4 and Mark_Thompson24. With each screen name, Hensley was pretending to be a different person. At the time, the government did not know that all three screen names were the same person. As MaverickMatt4, Hensley pretended to be a 19-year-old male living an hour north of Indianapolis. He again requested that Jen give her age—she reaffirmed that she was thirteen—and then asked her pointed questions about her sex life, including whether a guy had ever "fe[lt] you up" and if she had ever masturbated.

As Mark_Thompson24, Hensley pretended to be a 21-year-old male living in downtown Indianapolis. Hensley told Jen he was "horny" and wanted "to get to know [her] with [her] clothes off." He also asked her if she would come hang out with him and "help [him] out" by performing various sex acts with him. Hensley later asked Jen for her bra size and fantasized about having sex with her.

Hensley continued conversing with Jen the next day. Using the screen name NIPSCO26, he posed as a fifteen-year-old girl and questioned Jen repeatedly about her age to make sure she was thirteen and not just "do[ing] some trapping work." He also used the screen name Mark_Thompson24 to encourage her further to have sex with him, going so far as to offer to pick her up that night. When Jen expressed fear about getting pregnant, Hensley told her that she

would not get "preggers" if they had sex after her period or engaged in coitus interruptus.

The next evening, using the screen name MattyMac99, Hensley was at it again. He engaged Jen in another highly sexualized conversation and attempted to arrange a meeting with her. During their next conversation, Hensley continued to push for a meeting with Jen. He talked about the possibility of her becoming his girlfriend and attempted to devise a plan for her to meet him at Valparaiso University.

Although the meeting at Valparaiso University did not happen, Hensley kept pressing Jen to meet him. He also continued to groom Jen for a sexual encounter. On one occasion, Hensley, using the screen name NIPSCO26, contacted Jen and—again pretending to be a fifteen-year-old girl—told Jen how "she" loved having sex with older men because they were more experienced than younger guys. He also told Jen that thirteen was old enough to have sex and appealed to the lack of concern by "her" dad, a doctor, in order to show Jen that her fears of pregnancy and sexually transmitted diseases were overblown.

After a phone conversation on August 18, Hensley agreed to meet Jen near her house around 3:00 p.m. later that day. As the time for the rendezvous approached, a uniformed police officer stationed near the designated meeting place observed Hensley drive past his parked squad car. Hensley did not stop, and the officer made no attempt to arrest him. During a chat session that night, Jen asked Hensley why he had not stopped by that day. Hensley replied that there were cops everywhere, that he could be arrested for coming to see her, that she was too young for him, and that a guy his age hanging out with a girl her age would not look good.

Agents arrested Hensley at his home the next day. They also executed a search warrant, seizing a computer from Hensley's living area in the home's basement. Upon examining that computer, forensic experts discovered that the screen names Hensley used to contact Jen originated from it. They also found that someone had attempted to delete those screen names from the computer.

Hensley was charged in a one-count indictment with attempting to solicit a minor for sex in violation of 18 U.S.C. § 2422(b). At trial, the government introduced evidence of Hensley's prior online relationship with T.G., a minor from California. Prior to T.G.'s testimony, the district court gave the following instruction:

> The testimony that you're about to hear from this witness ... will be evidence of acts that the Defendant may have committed other than those that are charged in the indictment. You should consider this evidence only on the issue of the Defendant's intent, and you should consider this evidence only for this limited purpose and for no other purpose.

T.G. testified that she first met Hensley in an Internet chatroom when she was 12. After she conversed with him for awhile, Hensley moved to sexual topics, such as the first time T.G. "got sexual" and if she knew how to masturbate. Although T.G. initially told Hensley she was 14, she later divulged her true age on her thirteenth birthday. Despite knowing her real age, Hensley continued to talk with T.G. about sexual subjects. Later, after exchanging phone numbers, they began engaging in phone sex. T.G. also testified that, although Hensley never came to visit

her, he had told her he was going to make preparations to fly out to see her.

The jury convicted Hensley, and the court proceeded to sentencing. Under the guidelines manual effective November 2006, Hensley's base offense level was 24. See U.S.S.G. § 2G1.3(a) (Nov.2006). Although Hensley's sentencing hearing was originally scheduled for October 2007—when the November 2006 guidelines manual was in effect—it was postponed until January 2008 at the request of the government. At the January 2008 hearing, the district court calculated the advisory guidelines using the guidelines manual effective November 2007. That version contained Amendment 701, which raised Hensley's offense level under U.S.S.G. § 2G1.3 from 24 to 28, thereby increasing his sentencing range (after two two-level enhancements) from 78-97 months to 121-151 months. See U.S.S.G. § 2G1.3(a)(3) (Nov.2007). The mandatory minimum sentence under 18 U.S.C. § 2422(b) was 120 months' imprisonment, and the district court sentenced Hensley to 125 months' imprisonment. Hensley appeals his conviction and sentence.

II.

On appeal, Hensley first argues that the district court erred in admitting evidence of Hensley's online relationship with T.G. We review the evidentiary decisions of the district court for an abuse of discretion. *United States v. Prieto*, 549 F.3d 513, 523 (7th Cir.2008). Rule 404(b) of the Federal Rules of Evidence provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Such evidence is admissible, however, where offered for a purpose other than showing pro-

pensity, such as to establish intent, knowledge, lack of mistake, motive, or opportunity. Fed.R.Evid. 404(b); *United States v. Vargas*, 552 F.3d 550, 554 (7th Cir.2008). According to this court's four-part test, a district court determining the admissibility of "other acts" evidence under Rule 404(b) as well as Rules 402[1] and 403[2] must consider whether:

> (1) the evidence is directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged; (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue; (3) the evidence is sufficient to support a jury finding that the defendant committed the similar act; and (4) the evidence has probative value that is not substantially outweighed by the danger of unfair prejudice.

United States v. Diekhoff, 535 F.3d 611, 617 (7th Cir.2008) (quoting *United States v. Simpson*, 479 F.3d 492, 498 (7th Cir.2007)).

Hensley concedes that the government established the second and third elements of the four-part test—the similarity and temporal proximity of Hensley's relationship with T.G. and the evidence sufficient to establish it. Those concessions are signifi-

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[1] Federal Rule of Evidence 402 provides that "[a]ll relevant evidence is admissible" and "[e]vidence which is not relevant is not admissible."

[2] Federal Rule of Evidence 403 states that relevant evidence nevertheless "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."

cant, as the other two elements are easily met.[3] Regarding the first, the district court found that the evidence was relevant to show both Hensley's intent and knowledge, and we agree. From the very outset of the trial, Hensley put his intent to solicit sex from a minor and his knowledge that Jen was a minor at issue. During opening argument, Hensley's attorney argued that he "had every reason to believe the person at the other end of this computer was not 13 years of age."[4] Throughout the trial, Hensley continued to advance his argument that he did not believe Jen was underage. While cross-examining the government's witnesses, Hensley's attorney attempted to leave the jury with the impression that he would

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[3] Notwithstanding his concession of similarity, Hensley argues that the acts are unrelated. This is so, says Hensley, because 18 U.S.C. § 2422(b) incorporates state law ("Whoever, using ... any facility or means of interstate ... commerce ... knowingly persuades [a minor] to engage in ... any sexual activity *for which any person can be charged with a criminal offense*"), and the state-law offenses underlying the charged § 2422(b) offense and what could have been charged under § 2422(b) for Hensley's online relationship with T.G. are not the same. According to Hensley, the conduct at issue at trial is punishable as child solicitation, Ind.Code § 35-42-4-6, whereas his online involvement with T.G. only would have amounted to vicarious sexual gratification, Ind.Code § 35-42-4-5.

[4] Hensley's attorney came perilously close to opening the door to the T.G. evidence under Fed.R.Evid. 404(a)(1) when he appeared to advance an entrapment defense, claiming during opening statements that "Hensley ha[d] no history as a predator of any kind whatsoever" and asking government witnesses questions about Hensley's predisposition to commit the offense. However, Hensley wisely withdrew reliance on that defense later during trial, and the government does not advance any argument for the admissibility of the T.G. evidence under Rule 404(a)(1).

not have interacted with Jen had he really believed she was 13. And, at closing, he similarly contended that Hensley had "every reason to believe" that Jen was 18. The evidence about T.G., of course, was highly relevant to showing the opposite; it demonstrated that Hensley had no qualms about pursuing a sexual relationship with a person he knew was a minor.

Even assuming Hensley had not conceded similarity (he did), we would nevertheless reject that argument. Our case law does not require such a narrow rendering of similarity. See *Vargas*, 552 F.3d at 555 ("We have repeatedly held in the context of Rule 404(b) that similarity is relevant only insofar as the acts are sufficiently alike to support an inference of criminal intent.... *The prior acts need not be duplicates of the one for which the defendant is now being tried.* This test is not unduly rigid, and the term 'similarity' has been loosely interpreted and applied." (internal citation and quotations omitted) (alteration in original)). The relevant similarity here is, as Hensley himself acknowledges in his brief, that in both instances he was attempting to persuade a minor to engage in sexual activity.

The relevance of the T.G. evidence to rebut Hensley's defense of lack of knowledge also strongly supports weighing the fourth factor, the balancing of the probative value with unfair prejudice, in favor of admissibility. While the evidence was prejudicial, it was not unfairly so. Furthermore, the district court's limiting instruction, given prior to T.G.'s testimony, provided a bulwark against any unfair prejudice. See *United States v. Hearn*, 534 F.3d 706, 713 (7th Cir.2008) (noting that "such limiting instructions are effective in reducing or eliminating any possible unfair prejudice from the introduction of Rule 404(b)

evidence") (internal quotation marks omitted). We therefore see no abuse of discretion in the district court's decision to admit the evidence of Hensley's prior relationship with T.G.

Moreover, even without the evidence concerning Hensley's relationship with T.G., a reasonable jury easily could have found that Hensley was guilty of attempting to persuade Jen to engage in sexual activity with him in violation of § 2422(b). See *Vargas*, 552 F.3d at 558. The government presented evidence that Hensley had numerous online and phone conversations with Jen—during which Jen made it crystal clear that she was underage—about meeting for sex. It also presented evidence that Hensley arranged a meeting place and time and traveled to the meeting place; that Hensley left the area after seeing law enforcement officers nearby and attempted to destroy the evidence on his computer of his chats with Jen; and that Hensley, in his final online conversation with Jen, admitted that he could be arrested for coming to see her, that she was too young for him, and that he did not stop to see her because there were "cops everywhere." Thus, had any unfair prejudice resulted from the evidence of Hensley's relationship with T.G., it would not merit reversal because the other evidence of Hensley's guilt was overwhelming. See Fed.R.Crim.P. 52(a).

Hensley next contends that the government failed to present sufficient evidence to show that he took a "substantial step" towards the completion of the § 2422(b) offense, as is necessary for an attempt conviction. United *States v. Coté*, 504 F.3d 682, 687 (7th Cir.2007). Ordinarily, our review of a challenge to the sufficiency of the evidence is quite deferential, looking only at whether "evidence exists from which

any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Hach*, 162 F.3d 937, 942 (7th Cir.1998). That standard, by itself, presents "a nearly insurmountable hurdle to the defendant." *Id.* (quoting *United States v. Teague*, 956 F.2d 1427, 1433 (7th Cir.1992)). Hensley's trouble is compounded, however, because he did not raise this issue in his motion for judgment of acquittal in the district court. Hence, under the plain error standard, he faces the even more difficult task of showing that a "manifest miscarriage of justice will occur if his conviction is not reversed." *United States v. Irby*, 558 F.3d 651, 653 (7th Cir.2009). "Put another way, reversal is warranted only if the record is devoid of evidence pointing to guilt, or if the evidence on a key element was so tenuous that a conviction would be shocking." *Id.* (internal quotations omitted).

Hensley falls far short of meeting that standard. He relies almost exclusively on *United States v. Gladish*, 536 F.3d 646 (7th Cir.2008). In that case, this court held that sex talk alone does not amount to a "substantial step." 536 F.3d at 650. But there is much more than mere talk here. Not only did Hensley "groom" Jen for sex by conversing with her using multiple online personas, see *United States v. Zawada*, 552 F.3d 531, 535 (7th Cir.2008); *United States v. Brand*, 467 F.3d 179, 203 (2d Cir.2006), and arrange a meeting place and time to meet her, *Gladish*, 536 F.3d at 649 (citing cases), he *actually traveled* to the meeting place, being deterred from the encounter only by the presence of law enforcement. As we stated in *Gladish*, that is more than enough for a jury to find a "substantial step." See *id.*

Hensley makes much of his last phone call to Jen before he traveled to meet her, during which he told her he was not sure sex was a good idea and asked if it was alright if they just hung out together. Hensley claims this shows he did not intend to meet her for sex. However, a jury was entitled from the evidence to conclude that Hensley's intent was otherwise—that he wanted sex, and not just to "hang out." Even a cursory reading of the transcripts of the conversations between Hensley and Jen reveals that Hensley had sex on his mind and was interested in much more than a platonic relationship with Jen. Indeed, Hensley went so far as to use one of his multiple personas (as a 15-year-old girl) to test Jen in order to make sure she was not a government agent. That Hensley took such precautions strongly suggests a desire for sex rather than simple friendship. Furthermore, the jury heard other evidence showing Hensley's consciousness of guilt: Hensley's attempted destruction of the incriminating chat profiles after he noticed police near the prearranged meeting place, as well as Hensley's last conversation with Jen wherein he told her there "were cops everywhere" and he could be arrested for coming to see her. From that evidence, a reasonable jury could find that Hensley intended to have sex with Jen when he went to meet her. Thus, Hensley has failed to show that upholding his conviction will result in a manifest miscarriage of justice.

Lastly, Hensley challenges the district court's calculation of his advisory guidelines range using the November 2007 guidelines manual, instead of the November 2006 version. We have previously rejected such a challenge in *United States v. Demaree*, 459 F.3d 791 (7th Cir.2006), wherein we held that a district court can apply a change in the Guidelines that

expands a defendant's advisory guidelines range without offending the Ex Post Facto Clause. Hensley acknowledges *Demaree* but argues that an exception should be made to its rule in this case. Such an exception is warranted, Hensley contends, because *here the government*, and not Hensley, asked for the continuance of the sentencing hearing that led to the application of the more stringent advisory guidelines.

We fail to see how that fact is significant. As we remarked in *Demaree*,

> A judge who said he was persuaded by the insight that informed the new guideline to give a sentence within the range established by it could not be thought to be acting unreasonably.... [W]henever a law or regulation is advisory, the judge can always say not that he based his sentence on it but that he took the advice implicit in it. A judge is certainly entitled to take advice from the Sentencing Commission.

Id. at 795. The same holds true here. Regardless of who sought the continuance,[5] the district judge was entitled to take into account the change in the Guidelines when fashioning a sentence. No error was committed therefore in the calculation of Hensley's advisory guidelines range. Because Hensley makes no further challenge to his sentence, we will not disturb it.

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[5] Hensley does not argue that the government intentionally delayed the sentencing so the amendment would take effect. There is no reason for the government to do such a thing, since under the logic of *Demaree*, the government can bring guideline changes to the attention of the district court before they take effect. See *id.*

III.

The district court did not abuse its discretion in admitting evidence of Hensley's prior relationship with T.G. as probative of Hensley's knowledge that Jen was a minor and his intent to solicit sex from her. The court's limiting instruction adequately prevented any unfair prejudice stemming from that decision and, at any rate, the other evidence against Hensley was overwhelming and more than sufficient to support the jury's finding that Hensley attempted to solicit a minor for sex in violation of 18 U.S.C. § 2422(b). Hensley's final argument—that the district court erred in calculating his advisory guidelines range because it used the November 2007 guidelines manual instead of the guidelines manual effective November 2006—is foreclosed by our decision in *Demaree*. We therefore AFFIRM Hensley's conviction and sentence.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Government,	)	
	)	Cause:
vs.	)	
	)	2:06 CR
MATTHEW HENSLEY,	)	168
	)	
Defendant.	)	

The SENTENCING in the above-entitled matter was commenced before Honorable Philip P. Simon[,] judge of said court, at the Federal Building, 5400 Federal Plaza, Hammond, Indiana, on the 11th of January, 2008 commencing at the hour of 1:05 in the afternoon.

[Excerpt: page 5, line 1: page 12, line 23]

THE CLERK: All rise.

THE COURT: You can be seated. All right. Good afternoon every one. We're on the record. The cause number is 2:06 CR 168 United States versus Matthew Hensley.

And we're here today for the sentencing of Mr. Hensley who's present in person with his lawyer Alex Woloshansky. The Government is represented by Phil Benson, its Assistant United States Attorney.

Back on the 13th day of July of 2007, the jury returned a verdict finding the Defendant guilty on—in the indictment in this case. And then on the 17th day of October of 2007, I received a written presentence report along with addendum from the Probation Department.

And then subsequent to that, I received two additional addenda, one—well, I received two others. There was a second addendum, and then a third addendum. And I've reviewed both of those in advance of the hearing today.

I also just reference for the record that I received a number of letters on behalf of the Defendant that I have fully read and considered in advance of the hearing today. I received a letter from Mr. Hensley, meaning his father, Mr. Hensley.

I also received a letter from the defendant's mom, Cathy Hensley. I received a letter from the head basketball coach at Valparaiso University, Dr. Homer Drew, a letter from a Kenneth Markfull.

I also received a letter from a James Brickman, a letter from Father Kevin McCarthy from Saint Theresa of the Ville. I received a letter from a Lila Jarvis.

And so, I've reviewed all of those letters in advance of hearing today.

All right. Mr. Woloshansky, did both you and your client receive a copy of the presentence report and those addenda some time before the hearing today?

MR. WOLOSHANSKY: We did, your honor.

THE COURT: Mr. Hensley, did you have a chance to review the presentence report and go over its contents with Mr. Woloshansky?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Mr. Benson, did the Government receive and review the presentence report and the addendum prepared by the probation officer.

MR. BENSON: We have, your Honor.

THE COURT: All right. The presentence report and the addenda are now placed in the record under seal. It is directed if an appeal is taken, counsel on appeal shall be permitted access to the sealed report.

It's further directed that counsel on appeal shall not be permitted access to the recommendation of that report.

Now, the addenda to the presentence report indicates that there are no factual or legal issues in dispute, and there is no dispute as to the appropriate offense level and criminal history category under the advisory Sentencing Guidelines.

Is that true, Mr. Woloshansky?

MR. WOLOSHANSKY: Well, only as to which set of guidelines you use. 2006 versus 2007, Your Honor. That's the only dispute we have here.

THE COURT: Okay. Has that been raised in an addendum?

I mean, have you filed an objection arguing that one set of guidelines should be used over the other?

MR.WOLOSHANSKY: Yes.

This sentencing date was originally set for October the 31, two—

THE COURT: Right. The day before the guidelines changed.

MR.WOLOSHANSKY: Exactly.

THE COURT: Why did it get changed?

MR. WOLOSHANSKY: Why did it get changed.

THE COURT: I was trying to remember, why did it get changed? I was surprised it got changed.

MR. WOLOSHANSKY: There was a—there is a report in the file, the third addendum to your presentence report indicating that Mr. Benson wanted to check to see the supervised release, whether it was mandatory to be life or discretionary.

THE COURT: That was that issue about whether or not what you just said, the supervised release is from five to life. I suppose.

MR. BENSON: Yes.

THE COURT: There is some indication in the guidelines it might be mandatory life, but it seems that is actually discretionary.

MR. BENSON: The report originally read—I didn't catch it until the last minute. I apologize. Supervised release term was three to five. Upon further reviewing, consulting with one of my colleagues, outside of our office, they pointed out that five is the minimum and life is the maximum that's under the guidelines, certainly not statutory.

Five years is statutory minimum.

THE COURT: Now, the point I think that Mr. Woloshansky is raising, but for that, the sentencing would have gone down on the 31st of October, the day before the change of the guidelines, which now

exposes Mr. Hensley from something below the mandatory minimum to 121 to 151.

BENSON: Uh-huh.

COURT: So, what's the Government's position on that issue?

MR. BENSON: Given the Supreme Court's recent holding about what import the guidelines should be given, I don't think it makes any difference, judge. This Court would consider the guidelines in the same as any other factor it would have. It could have—it could have given the minimum of 121 months before it was continued.

There certainly is no ex post facto. That is what counsel specifically raised, because they are advisory. But I think given the latitude the Court has, I don't think it makes any difference when it changed to be honest with you.

THE COURT: Okay. Mr. Woloshansky.

MR. WOLOSHANSKY: My position is, Your Honor, the actual numbers are under the 2006 guidelines, his score of 28 would give him 78 to 97 months.

Under the 2007 guidelines which would have taken [e]ffect the following day after our originally scheduled sentencing, the guidelines called for 121 to 151 months. By my rough calculations, that is a 50 percent increase in a recommended guideline sentence.

So, I'm asking the Court to utilize your discretion, to acknowledge that Defendant had nothing to do with rescheduling the sentencing date after October the 31, the date you first said to use the '06 guidelines.

THE COURT: Okay. I understand the point.

Mr. Benson, do you have any response to that?

MR. BENSON: No, just that it was continued—I guess, could I say at the Government's request but because the probation report, it was—it would have misinformed the Court, and I have an obligation to make sure the Court is properly informed.

THE COURT: I'm not casting blame. I don't think counsel is casting blame here.

I think the point he is making is it makes some sense. If the guidelines on October 31 were 78 months to 95 months, a sentence of 100 and say, 25 months, would have been perhaps viewed as much more unreasonable than if the range was 121 to 151 and it was squarely within the range.

Do you follow the point?

MR. BENSON: Yes, but that would direct the Court back to whatever value the guidelines have that they are to use the guidelines in effect at sentencing.

And it wasn't continued for the Government to get some more evidence.

It was—it was because the Court was notified that there was a mistake in the presentence report.

THE COURT: I understand. Okay.

All right. I'm going to apply the guidelines that are in effect on today's date because that's what the Supreme Court directs me to do. And I understand the point that you're making, but I do believe that what the Supreme Court and what the Seventh Circuit has directed more recently is that I am to apply

the guidelines that are in effect on the day of the sentencing.

So, I'm going to make the following guideline findings. There is a total offense level in this case of 32. And that's derived at as follows. There is an initial offense level of 28. Two points—that's pursuant to 2G1.3A3.

Two points were added because there was a minor—solicitation of a minor or an attempted solicitation of a minor pursuant to 2G1.3B3.

Two additional points were added pursuant to 2G1.3B4 for a total offense level of 32. There is a criminal history category of one, which leads to a range of potential imprisonment of 121 to 151 months under the guidelines.

The fine range [is] from 17,500 to 175,000.

Supervised release range is five years to life.

There is a $100 special assessment. And restitution is not an issue in this case.

All right. Without—understanding your argument, Mr. Woloshansky, and accepting I'm overruling your objection, so, without repeating any previously expressed objections, are those calculations correct?

MR.WOLOSHANSKY: Yes.

THE COURT: Mr. Benson.

MR. BENSON: Yes, Your Honor.

THE COURT. Can you tell me where you lodged this objection to, because I don't have it.

I don't like being surprised like this.

MR. WOLOSHANSKY: I had a letter dated November the 12, 2007 to Janice Lawton.

THE COURT: Can I see that letter please.

MR. WOLOSHANSKY: Sure. May I approach.

THE COURT: Sure.

MR. WOLOSHANSKY: Actually, the case law I cited probably wasn't in effect, but I was urging her to consider the 2006, the earlier guidelines based on Geo (phonetic). But Geo was only of import back when the guidelines were mandatory.

And the old law says if the new guidelines call for a greater penalty, you use the lower—the earlier guidelines if they are less harmful to the client.

THE COURT: That's—

MR. WOLOSHANSKY: So, but the point is, even under the old guidelines, they recognize there is some sort of remedy for an increased penalty based on using later guidelines at sentencing other than those who were in effect at the time of the incident because—and because they are mandatory.

Now, they are no longer mandatory, you've got discretion I think to go down wherever you want to.

And that Geo case is no longer controlling, but that is my objection to probation about using the newer guidelines.

THE COURT: All right. I'm going to take a five minute recess here. Janice, can I talk to you for a second.

THE PROBATION OFFICER: Sure.

(Short recess.)

* * * * *

[Excerpt: page 13, lines 3-9]

THE COURT: All right. One second.

All right. The court adopts the factual statements that are contained in the presentence report as to which there are—are no objections as my findings of fact for purposes of this sentencing. And I made my finding on what the applicable advisory-guidelines are. * * *

[Excerpt: page 48, line 13: page 56, line 20]

THE COURT: All right. Thank you.

The Supreme Court in its decision of United States versus Booker and United States versus Rita modified the Federal Sentencing Act and made the guidelines advisory.

Prior to Booker, the guidelines were mandatory. Judges like myself had to follow the guidelines, but Booker has essentially demoted the guidelines from mandatory status to advisory status.

What that means is that they serve as a source of advi[c]e to Federal judges.

I certainly have to take the guidelines into account in rendering a reasonable and appropriate sentence, but I'm also now permitted and also required to consider the factors under 18 USC [3553(a)] in arriving at a reasonable sentence.

As the Seventh Circuit stated in United States versus Saxonmayer, 91 Federal 3d, 680, Courts must derive whatever insight the guidelines have to offer, but ultimately the sentencing must be arrived at without a thumb on the scale in favor of a guideline sentence.

What that means is that the guidelines now are one factor in conjunction with a whole host of other factors in [3553(a)] that the Court should take into consideration in arriving at a sentence, but there is no presumption that the guidelines are, in fact, reasonable.

Now, by contrast, if I were to give a guideline sentence in this case, on appeal there is a presumption of reasonableness in the appellate Court, but that presumption does not apply in the District Court.

So the factors that I have to take into consideration are the nature and circumstances of the offense and the history and characteristics of the Defendant.

The need for the sentence imposed to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense.

I have to afford adequate deterrence to this type of criminal activity, protect the public from further crimes of the Defendant, provide the Defendant with needed educational, vocational training in the most effective manner.

I have to take into account, of course, the guidelines themselves and the policy statements in the guidelines, with the overarching goal here of avoiding any unwarranted sentencing disparity among similarly situated defendants, and also arriving at a sentence that is sufficient but not greater than necessary to achieve these goals.

And so, those are the standards that guide me in arriving at a sentence.

I do think that a guideline sentence in this case is altogether appropriate.

And I have calculated the guidelines to be 121 months to 151 months given the guidelines in effect at sentencing.

In any event, in light of the more—of the standards that I have just set out, with the guidelines now being advisory, whether this was—case was being sentenced prior to November 1 or today, I would have the authority, of course, to give the Defendant any sentence within the statutory maximum.

But I do think that the guidelines as I computed them here are reasonable, and I don't think a sentence at the mandatory minimum is appropriate here.

I do think this case is a little bit different from some of the others I've seen. There is a couple of points that I think are really important that I have to point out, Mr. Hensley.

And you know, what struck me in this case was this notion of assuming these three different identities at the same time.

That was really troubling to me, where essentially, you were posing as a sort of the good guy, who was trying to talk to the—this purported 13 year old, but doing it in more of an elliptical way.

Then you're online as kind of the bad guy, who was much more forceful, aggressive, crude, whatever adjective you want to describe it, also talking with that same person.

And then at the same time posing as a 15 year old girl, and telling this same person that, you know, having sex as a 13 year old is fine, as long as you find the right guy, with the clear implication being that at that very same time that you're chatting with this

target, you're posing both as the good guy and the bad guy.

You know, that really is calculated.

And it really demonstrates—it's nefarious and it's a window, I think, into—into maybe what was going on in your mind, a psyche that is perhaps troubling.

When I add that to, you know, the photograph of this young kid who was a student at Andrean High School with your semen on it—it's difficult to say that in open court with your parents here—but that's very troubling.

And when I add into that the fact that it wasn't just that you were chatting online, that you did in fact get in your car and you drove to Will Park.

I fully believe that had there been a 13 year old girl there and this wasn't an undercover agent, that you would have attempted to have sex with her.

I firmly believe that.

And then what I saw today about this text message about how you want to quote, unquote, "F" this partner of your—tennis partner of your sister who is perhaps 17 or 17 years old at the time when were you 23 or 24, whatever, you know, it's troubling.

I happen to think that a 10 year mandatory minimum, speaking broadly is really high though because it doesn't take into account differing people who commit this crime in different ways.

I just think it's out of wack, and I think Congress just flat has it wrong with a 10 year mandatory minimum.

I just don't think it's appropriate. I've had cases prior to this where, prior to the 10 year mandatory minimum, somebody who actually met up with somebody they met on line was mentally challenged and got a much lower sentence than a 10 year mandatory minimum.

The mandatory minimum at the time was five years.

This isn't an exercise in comparing cases, but I just happen to think that a 10 year mandatory minimum is too high for these cases.

There needs to be more leeway and discretion in my judgment, but that's for Congress to decide.

That's not for me to decide. But when I look at what I just sort of delineated and so, I look at that through the factors that I have to take into consideration, the nature and circumstances of the offense. I do think it's a serious offense.

And this behavior is troubling to me.

And so, I do think that a guideline sentence is appropriate.

I am not going to give a sentence at the high end of the guidelines. I think that is way too much in this case.

But I also will note that when I look at the characteristics of the Defendant, I have sort of a Jekyll and Hyde here. From all outward appearances you seem like a perfectly reasonable young man, and very smart too.

That your testimony during the suppression hearing stuck with me as somebody who is pretty bright.

You come from a nice family it seems, but this behavior with this kid in California was just as troubling to me. So, I have this Jekyll and Hyde.

So, the characteristics of the Defendant strike me as sort of a mixed bag here, but I am concerned with, you know, fashioning a sentence that's going to promote respect for the law, and more importantly, to deter people from contemplating doing this type of activity.

So, I'll now—taking all of that into consideration, I'll now state the sentence that I intend to give, but I'll give counsel one final chance to make any final objections.

All right. It is the judgment of the Court pursuant to Title 18 United States Code Section 3551 and 3553 as modified by United States versus Booker, it's the judgment of the Court that the Defendant Matthew Hensley is hereby committed to the custody of the Bureau of Prisons for a term of 125 months.

Upon release from imprisonment, the Defendant shall be placed on supervised release for a term of five years.

Within 72 hours of release from the custody of the Bureau of Prisons, the Defendant shall report in person to the probation office in the district to which the Defendant is released.

While on supervised release, Defendant shall not commit another Federal, state or local crime and shall comply with the 15 standard conditions that have been adopted by this Court and shall comply with the following additional conditions.

The Defendant shall cooperate in the collection of DNA as directed by probation office.

He shall also submit to one drug test within 15 days after being placed on supervised release and up to two periodic tests per month thereafter.

The Defendant shall not illegally possess a controlled substance, shall not possess a firearm or destructive device.

The Defendant shall also register with the state or local sex offender registration agency in any state where he resides or is employed, carries on a vocation or is a student as directed by his probation officer.

The Defendant shall participate in a sex offender testing and evaluation program to include any psychological behavioral assessments and polygraph examinations. The Defendant shall participate in a co-payment program to offset the cost of the testing and evaluation. And the co-payment amount is based on the annual poverty guidelines established by the US Department of Health and Human Services on a sliding scale basis.

The co-payment amount shall not exceed an amount determined by the probation officer's sliding scale for monthly co-payment.

The Defendant shall enter and attend sex offender specific group and individual counseling at an approved outpatient treatment as part of his supervised release if it's warranted from the testing that I have just discussed. And he shall also participate in paying for that program in a similar manner as I have just described.

The Defendant shall neither possess nor have under his control any matter that is—depicts or describes sexually explicit conduct as that defined—as that's defined in 18 USC 2256 or any manner—or

any matter depicting or describing sexual activity including any person under the age of 18.

The Defendant shall not have personal access to a computer internet services unless the probation officer shall have access to that—to that computer to be able to verify that information.

The Defendant shall also submit his person and any property, house, residence or computer to a search at any time with or without a warrant by any law enforcement officer or probation officer with reasonable suspicion concerning a violation of a condition of his supervised release or any unlawful conduct by the Defendant.

The—it's further ordered that the Defendant shall pay to the United States a special assessment of $100 which will be due immediately.

I'm going to waive the fine in this case, given the defendant's lack of assets and spotty employment history makes it very unlikely that he will able to pay a fine in this case.

All right. The sentence that I have just given is within the advisory guideline range. That range exceeds 24 months. I find that the guideline range as I've calculated it is reasonable and appropriate.

And that the sentence at the mid to low end of the range is appropriate. I think it's a hefty sentence to begin with for the reasons I've already stated, but a low end is not inappropriate again for the reasons that I've already stated.